

[Products Liability Law Daily Wrap Up, WARNINGS ISSUES—ASBESTOS—Md. Spec. App.: New trial granted to truck manufacturers in asbestos case, \(May 15, 2018\)](#)

Products Liability Law Daily Wrap Up

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By David Yucht, J.D.

In an action brought against two truck manufacturers by a worker who developed mesothelioma allegedly as a result of his exposure to asbestos in the companies' products, a state appeals court in Maryland determined that the trial court's jury instructions on negligence were erroneous and prejudicial to the manufacturers. Accordingly, the appellate court overturned the lower court's ruling denying a new trial (*Mack Trucks v. Coates*, May 11, 2018, Eyler, D.).

A state court jury in Maryland found Mack Trucks, Inc. (Mack) and Ford Motor Company (Ford) liable in negligence for failure to warn a worker about the presence of asbestos in the linings of brakes they supplied to his employer. Initially, he worked for the employer as a pipe layer. He cut cement pipe, creating a "dust storm." This pipe, produced by CertainTeed Corporation, contained asbestos. The worker was thereafter transferred to a different task working as a dump truck driver. He drove a Ford dump truck, from a fleet of Fords, for about four years. The friction lining in the Ford brake components contained asbestos. The employer sold its Fords and replaced them with Mack trucks. Until at least the late 1970s, the Mack brakes contained asbestos.

The worker routinely helped out in the "shop" area of his workplace by brushing off brake shoes and blowing out the brake wear dust with a pressurized air hose. This process created much dust that filled the shop. He estimated that he assisted on hundreds of brake replacement jobs. He specifically remembered working on Ford brakes. His memory was not clear as to Mack trucks. He allegedly never saw a warning about asbestos in the Mack or Ford brakes or components. He maintained that if he had known about the risk of asbestos exposure, he would have quit his job. In 2015, he was diagnosed with malignant mesothelioma. He filed suit against Mack and Ford, asserting claims for negligence and strict liability. Mack and Ford filed a cross-claim against CertainTeed. CertainTeed settled with the worker prior to trial.

Jury verdict. The jury found that the worker had developed malignant mesothelioma as a result of his exposure to asbestos; that he was exposed to asbestos fibers from products or equipment manufactured, supplied, or sold by Mack and Ford; and that the exposure was a substantial factor in causing him to develop mesothelioma. The jury also found Mack and Ford not liable for strict liability failure to warn but liable for negligent failure to warn. In addition, the jury returned a verdict in favor of CertainTeed on Mack and Ford's cross-claim. The trial court denied Mack and Ford's motions for a new trial and for judgment notwithstanding the verdict (JNOV). Mack and Ford appealed.

Inconsistent verdicts. Mack and Ford argued that negligent failure to warn included all the elements of strict liability failure to warn, plus one additional element; therefore, the verdict in their favor on strict liability failure to warn was irreconcilably inconsistent with the verdict against them on negligent failure to warn. However, the Court of Special Appeals of Maryland concluded that the verdict inconsistency issue was not properly before it. Because no timely objection to the verdict sheet which led to this inconsistency was stated, it was waived. Also, neither Mack nor Ford immediately objected to the verdicts on the ground of inconsistency.

Jury instructions. The appellate court held that the trial court erred by giving a jury instruction on negligence that was not generated by the evidence. According to the appeals court, the inclusion of instructions pertaining to manufacturing and design defects was error. The only liability issues before the jury were negligent failure to warn and strict liability failure to warn. Nevertheless, the trial court had instructed the jurors that in the negligence

claim, they were being asked to determine whether Mack and/or Ford were "negligent in manufacturing, selling, distributing, or supplying their product." The appellate court noted that because the verdicts were illogical, they were likely the result of these improper instructions, which were therefore prejudicial.

Proximate cause. The appellate court also determined that the trial court erred by not instructing the jurors that liability required a finding that the failure to warn was a proximate cause of the injury. The instructions did not otherwise make clear that even if the jurors found that Mack and Ford had a duty to warn that was breached, and the worker was injured by exposure to asbestos attributable to their products, the breach had to be a proximate cause of the injury.

Substantial factor causation. However, the substantial factor instruction given by the trial court was correct. Although Mack and Ford asserted that the trial court failed to "define" substantial factor causation, it appropriately defined the term by reference to the "frequency, regularity, and proximity" test.

Cross-claim against CertainTeed. The appellate court also found that Mack and Ford were entitled to a new trial on their cross-claim against CertainTeed. Mack and Ford asserted that the trial court erred because no reasonable jury could find that the worker's exposure to asbestos in CertainTeed's pipes was not a significant factor in causing his injuries. The appellate court noted that there was a conflict in the evidence as to whether the worker was exposed to asbestos from CertainTeed pipe. Accordingly, the issue was disputed and was properly submitted to the jury. However, the appellate court determined that when the trial court allowed the jury to hear an un rebuttable hearsay statement of CertainTeed stating that it had not sold asbestos-laden pipe to the worker's employer, it committed reversible error, thus requiring a new trial on the cross-claim.

Sufficiency of evidence. The appellate court found that there was sufficient evidence against Mack to allow this matter to be remanded. The appellate court pointed to expert testimony offered by the worker showing that each exposure to asbestos fibers was cumulative and increased the risk that an individual would develop mesothelioma. The appellate court noted that exposure to asbestos from a certain manufacturer's product may be proven by circumstantial evidence. In this case, there was evidence showing that the worker's employer purchased at least four Mack trucks in the late 1970s; that Mack did not begin phasing out asbestos-containing brake linings until the early 1980s; and that it did not complete that process until the mid-1980s. Thus, reasonable jurors could find that the Mack trucks purchased by the employer in the late 1970s had asbestos in the friction linings and that replacement parts supplied by Mack through the mid-1980s also contained asbestos.

The court concluded that the worker's evidence showed the "frequency, regularity, and proximity" needed for substantial factor causation. He adduced evidence that the brake linings of the four Mack trucks were serviced in the shop at least twice yearly, in addition to having clutch replacements every few years. He showed that he was in the shop daily, and often all day if it rained. Moreover, since a brake job took half a day to a full day and a clutch job took at least a full day, a reasonable juror could infer that it was more likely than not that the worker was present in the shop when brakes and clutches on Mack trucks were being replaced. Finally, the worker adduced evidence that he often worked directly on brake blow outs. When not helping directly, he was socializing with the mechanics, permitting an inference that he was in close proximity to the mechanics when brakes were being blown out. He presented evidence that he was regularly in the location where asbestos exposure occurred and that Mack's asbestos-containing product regularly was present in that location as well.

The case is No. [2709](#).

Attorneys: Tennille Checkovich (McGuirewoods Consulting LLC) for Mack Trucks, Inc. Jeffrey Utermohle (Law Offices of Peter Angelos, PC) for Christopher Coates, Sr.

Companies: Mack Trucks, Inc.

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